of its orders or of the persons of its judges is an arbitrary one at best, and to stretch it, as here, in a time of disorders and almost panic in the immediate vicinity, would seem to show that the court has been deserted by the calm judicial temper which should always characterize its proceedings. Some words of Sir George Jessel are much in point in this connection. "It seems to me," he said, "that this jurisdiction of committing for contempt, being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness and can be brought to bear on the subject. . . . I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, — that is, if no other remedy can be found."

RECENT CASES.

AGENCY — IMPLIED NOTICE. — Plaintiff intrusted money to M. to deposit in defendant's bank, expecting to receive as security either M.'s personal check or the defendant's check indorsed by M. But M. deposited the money to his own credit and received for it bankers' checks payable to himself, representing that he was plaintiff's partner, and proposed to use the checks as memoranda in making a settlement. M. indorsed the checks to plaintiff, who received them in the idea that they represented deposits made according to agreement. Subsequently, M. appropriated the money to his own use. *Held*, that plaintiff was chargeable with knowledge of the acts of M. as his agent, and could not recover. *Henry* v. *Allen*, 28 N. Y. Supp. 242, Bradley, J. *dissenting*.

The hardship engendered in this case by a strict application of the rule imputing to the principal the knowledge of the agent is obvious; and while the opinion of the court may be correct, it would seem that the reasoning of the minority leads to a more equitable result. The text writers, whose words are cited to sustain the opinion of the majority, are referring to implied notice in its application to the rights of a third party as plaintiff, and the quotations therefore are not directly in point. It has become firmly grafted to the general rule of implied notice in other jurisdictions, that such notice will not be presumed where the agent is doing an independent fraudulent act. This has received ample confirmation in Massachusetts. *Innerarity* v. *Bank*, 139 Mass. 332; *Allen* v. *R'y Co.*, 150 Mass. 206. The amount involved in the main case is sufficient to justify re-argument, and an authoritative statement from the Court of Appeals, determining the extent to which fraud on the part of the agent affects the doctrine of implied notice, will be awaited with interest.

BILLS AND NOTES — ACTION BEGUN ON LAST DAY OF GRACE. — This was an action by the holder against the acceptor. On the last day of grace the bill was presented at the bank, where by the acceptance it was made payable, and at a later hour on the same day plaintiff issued the writ in this action. *Held*, that the holder cannot sue the acceptor until the expiration of the last day of grace, although he could treat this as a dishonor and give notice to the drawer or indorser. *Kennedy* v. *Thomas*, L. R. [1894] 2 Q. B. 759.

The English Court of Appeal professes to follow certain cases in this holding, — *Wells* v. *Giles*, 2 Gale, 209, and *Leftley* v. *Wills*, 4 T. R. 170, — and neither of these necessarily stands for this view. In *Wells* v. *Giles* it does not appear that there was any demand at all, so the case could well stand on that. In *Leftley* v. *Wills* Lord Kenyon does rest the case on this ground, — *i. e.* that the acceptor has the whole of the last day in which to discharge the obligation; but, as Buller, J. shows, the case might well have been decided as it was, on the ground that the demand was not made at a reasonable time, — within business hours. It seems, therefore, that the court was not bound by authority, and that, on principle, the view adopted by the court is erroneous. The custom of merchants is that the holder shall determine reasonably at

what time of the last day of grace the bill or note shall be paid; whereas the ordinary debtor has until the last moment of the day, there being no duty in the latter case on the creditor to demand payment. For collections of authorities on the subject see Ames's Cases on Bills and Notes, Vol. II. pp. 86 and 95, n. 4; also 2 Daniel on Negotiable Instruments, p. 241, §§ 2 and 3.

BILLS AND NOTES — DELIVERY IN ESCROW. — *Held*, that notes could not be delivered in escrow to the agent of the payee to hold till the maker could investigate the indebtedness for which they were given. *Murray et al.* v. *W. W. Kimball Co.*, 37 N. E. Rep. 744 (Ind.).

Although a note cannot be delivered to the payee or his agent in escrow, following the analogy of deeds (Co. Lit. 36 *a*), there would be an equity between the parties as to the effect of the instrument. It would be much better to do away with the technical doctrine of delivery of deeds as applying to notes, and follow the analogy of chattels. 6 Am. & Eng. Enc. 862; Ames's Cases on Bills and Notes, Vol. II. p. 99, and cases cited.

BILLS AND NOTES — FRAUD — SUFFICIENCY OF PLEA. — In an action on a promissory note by the indorsee against the maker, the latter alleged fraud in the inception of the note. The plaintiff obtained judgment on the pleadings, on the ground that the answer should have alleged that plaintiff had knowledge of the fraud at the time it was indorsed to him. On appeal it was *held*, that the burden of proving *bona fides*, which includes a want of knowledge of the fraud alleged, was upon the plaintiff, and if so the burden of pleading this want of knowledge was his also. *Thamling* v. *Duffey*, 37 Pac. Rep. 363 (Mont.).

The authorities on the question of pleading here involved are apparently in hopeless conflict, but the diversity is chiefly due to the extreme looseness with which the courts use the phrase "burden of proof." Fraud in the inception of a note is a personal defence, and is demurrable unless the action is by the payee. When an indorsee sues, the plea should also allege that the plaintiff and every one in the line through whom the plaintiff claims had notice of the fraud or gave no consideration, for the plaintiff is protected if he has succeeded to the rights of a *bona fide* purchaser who has intervened. At the trial, it is the duty of the plaintiff to go forward with evidence to disprove the notice or lack of consideration alleged, but the burden of establishing them remains with the defendant throughout. If a bill were brought to enforce an equity against one who had obtained the legal title to land, chattels, or notes, there could be no doubt upon whom the burden of proving notice would lie. 100 Mass. 190. The question in the principle case would seem perfectly analogous. Langdell on Equity Pleading.

CARRIERS — REFUSAL TO TRANSPORT FREIGHT — TENDER. — A dispute having arisen between plaintiff and defendant in connection with matters not involved in this case, defendant informed plaintiff that it would not carry any more coal for plaintiff over its road. Plaintiff, relying on this statement, tendered no more coal to defendant for carriage, but subsequently, and in consequence of this refusal, was forced to give up its business, and brought suit againt defendants for refusal to transport coal. *Held*, the refusal of the carrier does not in the absence of tender of a definite amount for transportation amount to a waiver of such tender so as to subject the carrier to liability for loss of business caused by relying on such refusal. *Wilder* v. *St. Johnsbury & L. C. R. Co.*, 30 Atl. Rep. 41 (Vt.).

The court cites no cases in its opinion, and there seems to be little authority on this point, but it would seem that common sense necessitates the conclusion reached by the judges in this case. The court confines its decision to cases where the amount of property was in no way ascertained, and expressly declines to consider what plaintiff's rights would have been if the conversation between plaintiff and defendant had "related to some specific property then upon the line of defendant's road awaiting shipment, or even to some distinct proposal dependent upon the defendant's services."

CHATTEL MORTGAGE — CROPS TO BE PLANTED — RIGHTS OF SUBSEQUENT PURCHASER. — *Held*, a chattel mortgage on crops to be thereafter planted is void as against a subequent purchaser at an execution sale. *Rochester Distilling Co.* v. *Rasey*, 37 N. E. 632 (N. Y.).

It is not questioned that that which has a potential existence may be the subject of a mortgage or sale, but the court declares that the annual product of labor and cultivation cannot be said to have a potential existence before planting. Upon this view the decision is brought within the authority of cases holding that a mortgage of property to be thereafter manufactured or purchased is void. *Otis* v. *Lill*, 8 Barb. 102; *Gardner* v. *McEwan*, 19 N. Y. 123. While deciding that crops not yet sown do not have potential existence, the court distinguishes such cases as *Andrew* v. *Newcomb*, 32 N. Y. 417, and *Caffrey* v. *Woodin*, 65 N. Y. 459, which hold that crops not yet sown may be

mortgaged by a lessee to his lessor as security for rent, on the ground that, title being in the lessor, the agreement between the lessor and lessee for a lien upon the crops operates as a reservation of title in the lessor to the products of the land. *Conderman* v. *Smith*, 41 Barb. 404, seems to be inconsistent with the principal case. There a lessee of a farm and cows mortgaged to the lessor the butter and cheese to be made during the season, and the mortgage was held good as against a subsequent purchaser of the cheese at an execution sale. The doctrine of reservation of title does not apply there, for the mortgage was made subsequently to the lease and was not a part of it. Of the question whether crops not yet sown have a potential existence, see authorities collected in the American note, Benjamin on Sales, 6th American edit., p. 86.

CONTRACT — RESTRAINT OF TRADE. — *Held*, that a combination of wholesale dealers to control the price of beer within a city is not void as in restraint of trade. *Anheuser Busch Brewing Ass'n* v. *Houck*, 27 S. W. Rep. 692 (Tex.).

The Pennsylvania court has just reached a contrary result in the case of *Wester* v. *Continental Brewing Co.*, 29 Atl. Rep. 102. See 8 HARVARD LAW REVIEW, p. 176. The decision here is rested on the ground, that, though beer is a staple of commerce, it is yet not such a commodity that restriction of its sale will be declared illegal by the court.

CONSTITUTIONAL LAW — ELEVATED RAILROADS IN STREETS — TAKING PRIVATE PROPERTY. — A railway company built abutments in the centre of a street to be used as the approach for elevated railway tracks. The abutting land owners did not own the fee in the bed of the street. *Held*, this was not a taking of the property of abutting landowners within the meaning of the article of the Constitution which prohibits the taking of private property for public use without compensation, so as to entitle the landowners to enjoin the completion of the same until compensation be paid for the injury. *Garrett* v. *Lake Roland El. Ry. Co.*, 29 Atl. 830 (Md.), Bryan, J. *dissenting*.

The decision seems entirely correct. The sound distinction is taken between consequential damages arising from the defendant's act, and an actual taking. There is no taking, it is said, without some actual appropriation or invasion of the land, though there is a remedy at law for injuries done to the property provided by statute and by the ordinance incorporating the defendant company. The case contains a full review of the American authorities.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — EMINENT DOMAIN. — Congress incorporated the defendant company for the purpose of constructing a bridge across the Hudson River between the States of New York and New Jersey "in order to facilitate interstate commerce." The plaintiff objected to the company's taking his land for the approaches to the bridge under the right of eminent domain.

Held, Congress has power either directly or through a corporation created for the purpose to construct bridges over navigable waters between States, and to take private lands making just compensation "in order to facilitate interstate commerce." *Suxton* v. *North River Bridge Co.*, 14 Sup. Ct. Rep. 891.

The power of Congress to incorporate was little called for in former times, and doubts were entertained concerning it. Its frequent exercise to-day in keeping pace with the demands of commerce leaves no question as to its existence, and furnishes a notable instance in refutation of the claim that striking out a power is equivalent to prohibition. Mr. Madison proposed in the Constitutional Convention that Congress should be given the power to incorporate, but the proposition was defeated without much discussion. 5 Ell. Deb. 543, 544. That which was then expressly denied is now allowed by implication, if exercised in carrying out any of the delegated powers. 117 U. S. 151, 154; 125 U. S. 12, 13; 127 U. S. 39, 40. "The power of creating a corporation," said Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 411, "though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which powers are exercised, but a means by which other objects are accomplished." The test of the constitutionality of an incorporating act passed by Congress is fairly obvious. Hartshorne's Commerce Clause, p. 29.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — LICENSE TAX. — A canvassing agent of a portrait-maker at Chicago violated an ordinance of a city of Pennsylvania by soliciting orders for portraits without having paid a license tax. *Held*, whether the tax was levied for general revenue purposes or under the police power of the State, it is a direct burden upon interstate commerce, and therefore invalid. *Brennan* v. *City of Titusville*, 14 Sup. Ct. Rep. 829.

As many of the State statutes imposing a license tax upon peddlers and canvassers are phrased in general terms, it is well to be reminded of the limited authority by which they are enacted.

CONSTITUTIONAL LAW — POLITICAL RIGHTS — APPORTIONMENT. — Plaintiffs, who are candidates for the office of member of Assembly, seek to enjoin issuing notice of election and certifying candidates thereat under an apportionment act, which they allege to be unconstitutional in that it takes away the right of equal representation. *Held*, a court of equity has no jurisdiction in such a matter, since it involves political rather than civil rights. *Fletcher* v. *Tuttle*, 37 N. E. Rep. 683 (Ill.).

In the light of the prevalent desire of political parties to reapportion the various States, whenever they are placed in power, and to do it very unjustly, this decision is interesting and instructive. That it is good law cannot be doubted. The "Reconstruction Acts" cases are cited, — *Georgia* v. *Stanton*, 6 Wall. 50, — and the court discusses also the power, said to be given by the Constitutions of many States to the Supreme Courts thereof, to issue such injunctions. *State* v. *Cunningham*, 83 Wis. 90. The language of some courts, where this power is given, is often loose, and this is spoken of as a judicial question. It is gratifying, therefore, to have a court come out squarely, and say that it is purely a political matter.

CONSTITUTIONAL LAW — STATUTES — REPEAL — AMENDMENT. — Laws of 1856, c. 179, § 16, provided that "the several cities . . . *which under special acts already* elect superintendents of . . . schools, . . . shall not be included in any school commissioner's district." It gave the supervisors power to divide their counties, exclusive of such cities, into school districts, as they might deem advisable. Laws of 1864, c. 555, tit. ii. § 2, provided that "the districts . . . as recognized in the election of commissioners in 1863 shall continue to be . . . the school districts . . . except as the same shall be changed by the legislature." Chapter 414, Laws of 1883, was entitled "An Act to amend section 16 of chapter 179 of Laws of 1856" (giving its title). Its first section re-enacted section 16 above "so as to read as follows," and the only alteration was a substitution — immaterial for our purpose — for the words above printed in Italics. It was *held*, that the Act of 1864 had neither directly nor by implication repealed the section of the Laws of 1856 in question. Apart from this, the Act of 1883 "was a re-enactment of the law" of 1856, "and, as an independent statute, is unaffected by considerations whether the provision of law which it purports to amend has been repealed or not by previous statutes." *People ex rel. Strough* v. *Board of Canvassers*, 37 N. E. Rep. 649 (N. Y.), affirming the decision of the General Term (28 N. Y. Supp. 871), where authorities are collected.

CONSTITUTIONAL LAW — TAXES — COLLATERAL INHERITANCE. — *Held*, section 1 of chapter 146 of the statutes of 1893, imposing a tax upon collateral inheritances, is not a tax upon real and personal estate within the meaning of article 9, § 8, of the Constitution of Maine, which provides that "All taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof," but it is an excise, clearly within the power of the legislature to impose. Neither is this act in conflict with the Fourteenth Amendment to the Constitution of the United States, which prohibits any State from depriving "any person of life, liberty, or property without due process of law." *State* v. *Hamlin et al.*, 30 Atl. Rep. 76 (Me.). See NOTES, p. 226, for a similar subsequent Massachusetts case.

CORPORATIONS — COLLATERAL ATTACK. — *Held*, that the corporate existence of a railroad company was not in issue in an action brought by it to condemn land. *Wellington & P. R. Co. Cashie & C. Railroad & Lumber Co.*, 19 S. E. Rep. 646 (N. C.).

This decision is opposed to the weight of authority upon the point. Most courts hold that, although in ordinary cases the existence of a *de facto* corporation cannot be questioned except in direct proceedings by the State, yet that in the exercise of the right of eminent domain its existence may be questioned by a private person.

Morawetz on Private Corporations, Vol. II. § 768.

CORPORATIONS — COUNTIES — LIABILITY FOR TORTS. — *Held*, a county is not liable for injuries caused an employee at its insane asylum, by the negligence of those in charge of the asylum. Being engaged in the performance of a public duty imposed generally upon every county of the State, — the care of its insane, — it cannot be sued by a private person except under statute. *Hughes* v. *Monroe Co.*, 29 N. Y. Supp. 495.

A learned author declares that there is a distinction to be made between municipal corporations proper, as incorporated cities and towns, and other organizations, such as townships and counties, which are established without any express charter or act of incorporation. The latter, termed "quasi corporations" are not liable in tort, according to the general rule, except by statute. Addison on Torts (B. & B.'s ed.), § 1526. Dillon on Mun. Corp. Vol. II. (4th ed.) §§ 948–963, lays down the above distinction and agrees with the principal case as to the liability of counties. So New York, *Ensign* v. *Board*, 25 Hun, 20, and *Alamango* v. *Board*, 25 Hun, 551, hold the

county not liable. In that State municipal corporations proper are not liable for negligence of their servants when engaged in duties public in character from which no special corporate benefit is derived. *Maximilian* v. *N. Y.*, 62 N. Y. 164, and cases cited. The decisions in Massachusetts accord with this view. *Howard* v. *Worcester*, 153 Mass. 426 (1891). The matter is discussed at length in *Hill* v. *Boston*, 122 Mass. 344. The rule as to counties is approved in *Hollenbeck* v. *Winnebago Co.*, 95 Ill. 148; *Summers* v. *County*, 103 Ind. 262; *Sherbourne* v. *Yuba County*, 21 Cal. 113; *Kincaid* v. *Harden Co.*, 53 Ia. 430. *Harmon* v. *St. Louis Co.*, 62 Mo. 313, and *Bigelow* v. *Randolph*, 41 Gray, 541, approve the rule as laid down, but hold that it does not apply where a special duty is imposed upon the quasi corporation with its consent. The authorities are collected in the principal case, in Dillon on Municipal Corporations at the sections cited, and in *Hill* v. *Boston*, *supra*.

CRIMINAL LAW — HOMICIDE — PASSION FROM MERE WORDS. — In an appeal from a conviction of murder in the first degree, the act of the defendant having been the result of a quarrel, it was *held*, that passion aroused by mere words cannot reduce homicide below the offence of murder in the second degree. *Smith* v. *State*, 15 So. Rep. 843 (Ala.).

The court say that no principle in our criminal jurisprudence is more firmly established than this one. Yet while it is true as a general rule that mere words are not sufficient provocation to reduce the offence to manslaughter, this statement of the principle seems to be too strong. A recent English case (*Regina* v. *Rothwell*, 12 Cox C. C. 145), while admitting the rule, holds that there may be circumstances which would warrant a departure from it, and lays down what appears to be a better rule, that the provocation, whether by words or otherwise, must be sufficient to cause an ordinary man to act as the defendant did. The result reached in the principal case is however perfectly sound on the facts.

EQUITY — RESCISSION OF A DEED GIVEN WITH INTENT TO DEFRAUD CREDITORS. — Where an owner, being apprehensive of an adverse termination to a suit in which he is involved, conveys his property to another without consideration, and with intent to defeat the recovery of a possible judgment, *held*, that he may not, after a judgment in his favor, invoke the aid of a court of equity to compel his grantee to reconvey. *Pride* v. *Andrew*, 38 N. E. Rep. 84 (Ohio).

The Ohio statute rendering fraudulent conveyances void as against attaching creditors is practically a re-enactment of the statute of Elizabeth; but it is everywhere held that this doctrine has no application as between the parties and their representatives. Equity will not allow a fraudulent grantor to impeach his deed or revoke an executed contract. There is a line of cases which perhaps may be regarded as laying down a modification of the general rule, holding that the grantor may compel reconveyance if the parties are not *in pari delicto*. Story, Eq. Jur. § 300; *Boyd* v. *De La Montaignie*, 73 N. Y. 498; *Poston* v. *Balch*, 69 Mo. 115. But to claim the benefit of this exception the plaintiff must make out a very clear case of undue influence on the part of his grantee. As such extenuating circumstances did not appear in the main case, relief was rightly refused.

EVIDENCE — PRIVILEGE — CONFIDENTIAL COMMUNICATIONS. — Defendant, a physician, having been sued for malpractice, attempted to put in evidence certain occurrences at the examination of the plaintiff. A statute provides that such occurrences and the results of such examinations should be confidential communications, — not to be disclosed without the consent of the patient. *Held*, when the patient sues the plaintiff for malpractice, the privilege is waived. *Becknell* v. *Hosier*, 37 N. E. Rep. 580 (Ind.).

This seems to be a new question, as no authorities are cited by the court and none are to be found in the text-books. On principle, however, there can be no doubt of the correctness of the decision; for, if this privilege were held to be available to the client in such a case, the physician would never be able to defend himself. In an early Indiana case, — *Nave* v. *Baird*, 12 Ind. 318, — it was held that in an action against an attorney for malpractice this privilege must be considered waived, and of course there is no practical difference between the two cases.

FRAUD — CONVEYANCE TO AVOID ATTACHING CREDITORS — NOTICE. — Where an absolute conveyance of land is made for a consideration grossly inadequate, the grantor retaining a valuable interest in the estate, and both parties acting with intent to embarrass creditors, *held*, such conveyance is void, not only against existing, but also against subsequent creditors and purchasers with or without notice. *Jones* v. *Light*, 30 Atl. Rep. 71 (Me.).

The authorities are in conflict on the question involved in this case. The conclusion reached is sustained by rulings in Massachusetts, Tennessee, and Kentucky. The

contrary is held in Ohio, Texas, and New Hampshire. *Stevens* v. *Morse*, 47 N. H. 532, (a well considered case which is not referred to by the Maine court,) decides that the statute 13 Eliz. c. 5, on the provisions of which as part of the common law the opinion in the principal case is based, cannot be taken advantage of by subsequent purchasers as it refers in terms to subsequent creditors. The New Hampshire court also objects that the practical result of the doctrine here advocated will be to nullify the well settled rule that a fraudulent conveyance is binding on the grantor and his heirs, by allowing him, subsequent to the fraudulent conveyance, to resell the land to whom he pleases.

PARTNERSHIP — ASSUMPSIT — IMPLIED PROMISE. — Plaintiff sold horse feed; defendant had been keeper of a livery stable to whom plaintiff had sold on credit, the goods being ordered by defendant's servant Stoever. Subsequently another man, Gore, came to plaintiff and bought feed for the same livery stable, and plaintiff, supposing that defendant was still the owner, continued to supply feed, for price of which this action is brought. Defendant claims that he had previously sold out to Gore. The judge below charged the jury that if defendant and Gore were partners defendant would be liable; and continues, "If you find that he was not a partner, that he had sold out in good faith, then it was his duty, as the goods were sold for the same business at the old stand, to have notified Mr. Shaunce [plaintiff] of the change that had been made in the proprietorship of the place. There is no doubt about that. Mr. McCrystal did take the precaution to inform the landlord, but he seems to have forgotten to inform the other people." *Held*, an examination of this record has failed to convince us that there is any substantial error therein. *Shaunce* v. *McCrystal*, 29 Atl. Rep. 866 (Pa.).

It would have been most satisfactory if the Supreme Court of Pennsylvania had seen fit to state the grounds on which they sustain this charge.

REAL AND PERSONAL PROPERTY — CONSTRUCTION OF WILL. — The testator devised his property both real and personal to his wife, giving her full power "to bargain, sell, convey, exchange, or dispose of the same as she may think proper; but if, at the time of her decease any of my said property shall remain unconsumed, my will is that the same shall be equally divided between my brothers and sisters and their children." The devisee entered, conveyed all the property to the defendant by way of gift, and died. *Held*, that under the will the widow took only a life estate in the property; that she held it as a quasi trustee for the remaindermen, having power to dispose of it as she might deem necessary for her support or for the benefit of the estate; but that by gift or otherwise she could make no conveyance involving a breach of faith toward the remaindermen which would defeat their rights, and that therefore the defendant held the property as trustee for them. *Johnson* v. *Johnson*, 38 N. E. Rep. 61 (Ohio).

This decision reaches a satisfactory result, and seems to be in line with authority both in Ohio and elsewhere.

REAL PROPERTY — DEDICATION — RIGHT RETAINED BY DEDICATOR. — In 1839 the United States dedicated a piece of land in Chicago to the public, this to be "public land forever and to remain vacant of buildings." According to an Illinois statute, the plat of the land having been recorded, the fee simple vested in the corporation of the city of Chicago. The defendant is about to divert this land from the purposes for which it was dedicated. *Held*, that the United States has no legal or equitable right to interfere (Brewer and Brown, JJ. *dissenting*). *United States* v. *Illinois Central R. R. Co.*, 15 Sup. Ct. Rep. 1015.

The majority opinion seems eminently sound. The dissenting opinion is interesting in that it holds that a dedicator may interfere if land is diverted from the purposes for which he gave it, though he parted with all his interest in the land. The opinion is based mainly on *Warren* v. *Mayor of Lyons City*, 22 Iowa, 351. It is not inconsistent with the facts of that case that the fee remained in the plaintiff, although the court certainly lay down principles broad enough to cover the present case.

REAL PROPERTY — PRESCRIPTION — TREES OVERHANGING NEIGHBOR'S LAND. — Where the defendant, without notice to the plaintiff, cut off branches of the plaintiff's trees which had overhung the defendant's land for more than twenty years, it was *held*, that the overhanging of the branches was not a trespass, and that no right was acquired by lapse of time; that the branches might be cut without notice, since no entry on the plaintiff's land was necessary. *Lemmon* v. *Webb*, L. R. [1894] 3 Ch. D. 1.

The case is right. The court have no difficulty in deciding that there is no prescriptive right, but reach the decision that notice is unnecessary only after long discussion. The last point, however, would seem quite as clear as the first, and not to call for so long a consideration.

REAL PROPERTY— REVOCATION OF LICENSE — ESTOPPEL. — The city of Augusta was given power by a special act to remove obstructions from the streets at the expense of the owners. Subsequently, licenses were granted permitting awnings to be erected, and were acted upon. The owners in this action ask to have the City Council restrained from removing these awnings. *Held*, that the city could not grant a perpetual right to maintain awnings, and hence the licenses were revocable; that the city was estopped from revocation until the owner had received a fair return for his outlay, made in reliance on the license. *City Council* v. *Burum*, 19 S. E. Rep. 820 (Ga.).

The court rightly says that the municipal authorities cannot grant away a substantial right of the public; but it proceeds to give the authorities such power to a certain degree on the ground of estoppel. These seem inconsistent, and it is hard to reconcile the latter with the need of the public to have the obstructions immediately removed. The difficulties of the case were hidden by the fact that all the owners petitioning were held to have received already a fair return for their outlay, thus defeating the estoppel. The court was influenced also by the Georgia rule, that an executed license is irrevocable.

SALE OF GOODS — ELECTION OF REMEDIES. — Goods were sold and notes of the vendee given for the purchase price, the title to the goods to remain in the vendor until the notes were paid. The notes being unpaid at maturity, the vendor brought an action on them and recovered judgment. *Held*, he may afterwards retake the goods by replevin. *Campbell Printing Press Co.* v. *Rockaway Pub. Co.*, 29 Atl. Rep. 681 (N. J.); *Moline Plow Co.* v. *Rodgers*, 37 Pac. Rep. 111 (Kan.), *contra*.

It is submitted that the Kansas decision is correct. The vendor cannot treat the transaction as valid and invalid at the same time. By bringing an action for the price he has elected to treat the vendee as owner of the goods. *Bailey* v. *Harvey*, 135 Mass. 172.

TORTS — CONVERSION — PAYMENT BY A BANKER TO A FRAUDULENT INDORSEE. — The payee of a crossed check specially indorsed it to the plaintiffs and posted it to them. A third party obtained possession of the check during transmission and altered the indorsement, making it payable to himself. This he presented at the defendant's bank in Paris, and asked them to obtain payment from their London correspondent. This they did, and handed the proceeds to him. In an action for conversion by the plaintiffs, *held*, that the defendants were liable for the amount of the check. *Kleinwort, Sons & Co.* v. *Comptoir National d'Escompte de Paris*, L. R. [1894] 2 Q. B. 157.

Though this decision seems to bear heavily upon the defendants who have been imposed upon by fraud, yet the holding is clearly right. The action was vigorously contested on the grounds that the plaintiffs had neither possession nor title, and therefore had no standing in court; also that there had been no conversion by the defendants. Obviously, however, the delivery to the post-office is, in legal contemplation, a delivery to the plaintiffs; and being thus in receipt of the check with a valid indorsement to themselves, they maintain trover against a mere wrongdoer. Then in presenting the check to their correspondent bank, and obtaining payment thereon for the fraudulent indorsee, the defendants were clearly guilty of conversion, in that they presented the check in the name of a stranger who had no title in it, and obtained payment for him.

TORTS — DEFAMATION — BELIEF OF DEFENDANT IN INTEREST OR DUTY IN PERSON TO WHOM DEFAMATORY STATEMENT IS MADE. — Defendants, who were rate payers of the parish, honestly and reasonably believing that the board of guardians were the proper authorities to whom to apply to secure an investigation, sent to them a letter containing defamatory matter concerning plaintiff, who was guardian of the poor. *Held*, the honest and reasonable belief that the board of guardians had an interest or duty in the subject-matter of the communication does not make the occasion privileged, if as a matter of fact they had no such interest or duty. *Hebditch* v. *MacIlwaine et al.*, L. R. [1894] 2 Q. B. 54.

This decision is in accord with the famous definition laid down in *Harrison* v. *Bush*, 5 E. & B. 344, (which was not necessary for the decision in that case,) that a communication is privileged if made by a person having an interest or duty in the subject-matter to one "having a corresponding interest or duty." In *Waring* v. *M'Caldin*, Ir. Rep. 7 C. L. 282, there is a dictum to the effect that the honest belief that a duty exists in the party to whom the statement is made, constitutes a privileged occasion, but that case is strongly disapproved of in the principal case. *Thompson* v. *Dashwood*, 11 Q. B. D. 43, which has already been discredited (Pollock on Torts, 2d edit., pp. 226, 245), is flatly overruled. In that case defendant wrote a letter containing defamatory matter intending to send it to a person to whom publication would have been privileged, and by mistake put it into the wrong envelope and sent it to another person. The defendant was not held liable. The fallacy in that decision is in the court's assuming the

letter to have been sent out on a privileged occasion. It is true the defendant intended to use a privileged occasion, and thought he was doing so, but he was not. It does not matter that the defendant did not intend to injure the plaintiff. *Curtis* v. *Mussey et al.*, 6 Gray, 261. The doctrine of the principal case, that the belief of defendant that the occasion is privileged does not make it privileged, harmonizes with the general rule that a mistake does not excuse. *Shepheard* v. *Whitaker* L. R. 10 C. P. 502; *Griebel* v. *Rochester Printing Co.*, 60 Hun, 319; *Mayne* v. *Fletcher*, 4 Man. & Ry. 311, 312, note; *Fox* v. *Broderick*, 14 Ir. C. L. R. 453, 459. But see *Hanson* v. *Globe Co.*, 159 Mass. 293. (Holmes, Morton, and Barker, JJ. *dissenting.*)

TORTS — IMPUTED NEGLIGENCE. — An infant twenty-two months old, being left by its mother, wandered on the track of the defendant, and was struck and injured by a train through the negligence of the defendant's train hands. *Held*, that a child of tender age is incapable of contributory negligence, and that in a suit by the child the negligence of the parent cannot be imputed to it. *Bottoms* v. *S. & R. Railroad Co.*, 19 S. E. Rep. 730 (N. C.).

This case adds North Carolina to the list of States which repudiate the doctrine of imputed negligence. The decision seems entirely sound. Whatever question exists where the suit is by the parent, in an action by the child for injuries received the doctrine is indefensible upon any theory.

TORTS — MALICIOUS PROSECUTION. — The plaintiff set out that he was arrested upon the complaint of the defendant; that the complaint was false and was known by the defendant to be false when he made it; that the complaint was made without probable cause and maliciously, with intent to injure the plaintiff; that when before the court upon this complaint, in consequence of false statements made by the defendant, that it would benefit the plaintiff to plead guilty, and would terminate the proceedings against him, and would release him from arrest and imprisonment to do so, believing these statements, under duress and threats of long imprisonment, and not knowing the consequences of his doing so, he formally pleaded guilty, though he was not guilty, as the defendant knew, and was sentenced to imprisonment, and imprisoned ten months. To this the defendant demurred. *Held*, that the plaintiff could recover. *Johnson* v. *Girdwood*, 28 N. Y. Supp. 251. See NOTES.

TRUSTS — REMOVAL OF NON-RESIDENT TRUSTEE. — The New York Code, § 263, subdivision 1, gives the superior city courts jurisdiction of any action to procure a judgment determining, annulling, or otherwise affecting an estate, title, or other interest in real property which is situated within the city where the court is located. *Held*, under this statute, that the courts of New York City have jurisdiction in an action to remove a trustee who resides outside the state, when the trust *res* is real estate in New York City. *Paget* v. *Stevens*, 28 N. Y. Supp. 549.

The dissenting opinion points out that an action for removal of a trustee is primarily an action *in personam*, to determine the right of defendant to exercise the privileges and enjoy the profits of his trusteeship, and would confine the operation of the statute to actions *in rem*. This would seem the better view.

TRUST DEPOSIT — MONEY PAID TO A BANK FOR A SPECIFIC PURPOSE. — The complainant gave money to a bank in payment of a note and took a receipt, which was to be given up when the note was returned. On the bank becoming insolvent without paying the note, *held*, that the complainant was entitled to have the assets in the hands of the receiver applied to the payment of the note. That the money was paid to the bank for a specific purpose, and it was not the understanding of the parties that the bank might use it for any other purpose. It made no difference that the complainant's money could not be identified. It was sufficient that it could be traced to the vaults of the bank. *Massey et al.* v. *Fisher*, 62 Fed. Rep. 958.

On principle it seems hard to make out a trust. It does not appear that the bank was expected to apply the money given by the complainant to the note. There is not much authority on the point, and what there is is conflicting.

WILLS — ERRONEOUS DESCRIPTION. — Testatrix devised the southeast quarter of a certain section, which quarter-section she did not own. The southwest quarter did belong to her, and the devisee claims this under the will. The will recited her ownership of the southeast quarter. *Held*, devisee can take the southwest quarter under this clause, as extrinsic evidence is admissible to identify the land devised (Kinne, J. *dissenting*). *Eckford* v. *Eckford*, 58 N. W. 1093 (Ia.)

This is the first time this question has arisen in Iowa, and the majority adopt the view of the majority in *Patch* v. *White*, 117 U. S. 20. This seems to be the better view. All extrinsic facts except direct declarations of intention can come in. See 6 HARV. LAW REV. 434, 10 Am. Law Reg., N. S. 93, and *Riggs* v. *Myers*, 20 Mo. 239. Opposed to this view are *Hurtz* v. *Hibner*, 55 Ill. 514, and 10 Am. Law Reg., N. S. 353.